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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NEW JERSEY TURNPIKE AUTHORITY, Plaintiff, v. YOUTUBE, INC., NEXTPOINT, LLC, LIVELEAK, ABC CORPORATIONS 1-10, and JOHN DOES 1-10, Defendants.	**DOCUMENT FILED ELECTRONICALLY** Civil No. **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S APPLICATION FOR AN ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS

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PRELIMINARY STATEMENT

In this case of copyright infringement, proprietary and confidential video footage of a horrific, fatal automobile accident has been flouted over the internet by companies seeking to make a profit off of websites capitalizing on the grotesque. In disregard of the copyright interests of Plaintiff New Jersey Turnpike Authority ("NJTA"), Defendants, YouTube, Inc., Nextpoint, LLC and LiveLeak.com (collectively "Defendants") have displayed on their respective websites a sensational video, undeniably recorded by the Plaintiff's camera, containing graphic detail of a vehicle crashing into a toll plaza and burning. The driver was killed in the accident. While the video is proprietary and confidential, it was wrongfully misappropriated and disseminated, and now appears on the three websites operated by Defendants. The video serves no worthwhile purpose and shows a tremendous lack of common human decency towards the family of the victim. Nonetheless, Defendants have either refused or failed to remove the video from their respective websites.

As the prospective owner of a federally registered copyright, Plaintiff is entitled to equitable relief under the Copyright Act, 17 U.S.C. § 101 et seq. Based on the undeniable evidence that the video in question was recorded by Plaintiff's camera and was subsequently copied and displayed by Defendants, a *prima facie* claim of copyright infringement has been set forth. Under circumstances such as these, Plaintiff is entitled to the preliminary injunctive relief sought herein, namely an order requiring Defendants to remove the copyrighted material from their respective websites, and preventing Defendants from further infringing on Plaintiff's copyrights. Moreover, it is respectfully submitted that such equitable injunctive relief is required not only to protect Plaintiff's copyright, but additionally to allow the grieving family of the depicted driver to mourn in peace, without the heightened attention created as a result of Defendants' conduct.

STATEMENT OF FACTS

A. The Parties

Plaintiff NJTA is an independent authority created pursuant to N.J. Stat. Ann. § 27:23-1 et. seq. (Verified Complt., ¶ 2.) The NJTA maintains a principal place of business at 581 Main Street, Woodbridge, New Jersey. (Id. at 1.) The NJTA exercises control over the operation of the Garden State Parkway. (Id. at ¶ 2.)

Defendant YouTube, Inc. ("YouTube") is a Delaware corporation that maintains a principal place of business at 1000 Cherry Avenue in San Bruno, California. (Id. at ¶ 3.) YouTube operates a popular online service that can be accessed at the website www.YouTube.com. (Id. at ¶ 4.)

Defendant NextPoint LLC ("NextPoint") is a Delaware limited liability company that maintains a principal place of business at 311 North Robertson Boulevard in Beverly Hills, California. (Id. at ¶ 7.) NextPoint operates a popular online service that can be accessed at the website www.Break.com. (Id. at ¶ 8.)

Defendant LiveLeak.com ("LiveLeak") is a company that maintains a principal place of business in the United Kingdom. (Id. at ¶ 5.) Based upon the "Terms and Conditions" on LiveLeak's website, it appears that LiveLeak maintains a registered agent in the Commonwealth of Virginia. (Id.) LiveLeak operates a popular online service that can be accessed at the website www.LiveLeak.com. (Id. at ¶ 6.)

B. Defendants' Video Sharing Websites

Defendants each operate popular video sharing websites where users can upload, view and share video clips. (Id. at ¶ 9.) The videos uploaded by YouTube's users become part of the YouTube.com library for performance and display on YouTube's website. (Id. at ¶ 42.) Likewise, the videos uploaded by LiveLeak.com's and Break.com's users become part of LiveLeak.com's and Break.com's websites, respectively. (See id.) Users of YouTube, LiveLeak and NextPoint services can search for videos stored in the respective website's libraries by entering a search query. (Id. at ¶ 10.) As a result of their search, users will receive a list of single frame images of video clips stored on the service, which assists users in locating the video for which they are searching. (Id.) Users can also search for videos on YouTube.com, LiveLeak.com and Break.com by entering search terms in search engines, such as www.google.com. (Id. at ¶ 11.) Searches conducted on search engines, such as www.google.com, for videos may yield results that include links to video clips on YouTube.com, LiveLeak.com and Break.com. (Id.)

Defendants control and directly profit from their websites. (Id. at ¶ 42.) Indeed, Defendants have the ability to control the content on their websites, as evidenced by their "Terms and Conditions," which users must agree to before posting videos. (Id. at ¶ 45.) In addition, through banner advertising displayed on their websites, Defendants derive advertising revenue directly attributable to the videos that are available for viewing and sharing on the websites. (Id. at ¶ 43.)

C. The Offending Video

On May 10, 2007, a vehicle traveling southbound on the Garden State Parkway ("Parkway") crashed into the Great Egg Harbor tollbooth in Somers Point, New Jersey. (Id. at ¶ 25.) The car accident resulted in the unfortunate and untimely death of a 52 year-old New Jersey resident. (Id. at ¶ 26.)

The horrific and fatal car accident was recorded by two cameras owned and operated by the NJTA at the Great Egg Harbor toll plaza on the Parkway. (Id. at ¶ 27.) In particular, the scene was captured by a camera that is situated on the northbound side of the Parkway, which records images of vehicles traveling southbound on the Parkway as they approach and enter the Great Egg Harbor toll plaza (hereafter referred to as the "operations camera"). (Id. at ¶¶ 19, 27.) The accident was also recorded by a Video Transaction Data Multiplexer ("VTDM camera") situated on the southbound side of the Parkway, which records images of vehicles traveling southbound as they exit the Great Egg Harbor toll plaza. (Id. at ¶¶ 24, 27.)

Because the videos of the car accident were recorded using the NJTA's cameras, the videos are original creations of the NJTA and constitute the copyrighted property of the NJTA. (Id. at ¶ 28.) Moreover, the videos constitute proprietary and confidential information under the NJTA's "Information Security Policy." (Id. at ¶¶ 30-32.) Thus, the videos were not to be disclosed or disseminated without authorization from the NJTA. (Id. at ¶ 32.)

On May 17, 2007, the NJTA learned that the video of the fatal car accident recorded by its operations camera had been posted on the internet at the website www.YouTube.com in violation of the NJTA's "Information Security Policy." (Id. at ¶ 33.) On the same date, the NJTA learned that the video of the aforesaid car accident also had been posted on the internet at the website www.LiveLeak.com. (Id. at ¶ 37.) Additionally, on May 21, 2007, the NJTA learned that its copyrighted video is being displayed on Break.com, the website operated by defendant NextPoint. (Id. at ¶ 41.) As of May 21, 2007, the NJTA's video from the operations camera had been viewed 189,037 times on LiveLeak.com, 19,833 times on YouTube.com, and 6,933 times on Break.com. (Id. at ¶ 48.) Less than 24 hours later, the NJTA's video from the operations camera had been viewed 213,295 times on LiveLeak.com, 24,346 times on YouTube.com, and 16,812 times on Break.com. (Id. at ¶ 49.)

Given the proprietary, confidential and copyrighted nature of the video, and that its public display on the internet displays a tremendous lack of respect and common human decency toward the family of the victim of the car accident depicted in the video, the NJTA sent correspondence to YouTube and LiveLeak requesting that the video be removed from Defendants' websites. (Id. at ¶¶ 1, 34, 38-39.) While YouTube agreed to remove the video from the website, the video has apparently been copied by YouTube users and, nonetheless, remains on the website. (Id. at ¶ 35.) YouTube did not even attempt to prevent the video from being uploaded again by users immediately after it was purportedly removed. (Id. at ¶ 36.) Even more egregious, LiveLeak flat-out refused to remove the graphic and sensational video from its website absent a "take-down order" from the Court. (Id. at ¶ 40.)

Defendants' blatant disregard of the NJTA's request left the NJTA with no choice but to federally register the copyrights to the videos recorded by its cameras to prevent the further unauthorized disclosure of the horrific car accident depicted therein. Accordingly, on May 22, 2007, the NJTA filed applications, along with the required fee and deposit, with the United States Copyright Office to obtain federally registered copyrights for the videos recorded by the operations camera and the VTDM camera. (Id. at ¶ 29.) The NJTA is presently awaiting issuance of the copyrights for these videos.

ARGUMENT

The NJTA seeks a return date for a preliminary injunction to prevent the irreparable harm that will result from the infringement of its federally registered copyrights. Defendants willfully published, displayed and reproduced a graphic and sensational, in addition to proprietary and copyrighted, video that was improperly misappropriated from the NJTA. The NJTA's copyrighted property has been viewed by literally hundreds of thousands of viewers in less than a week. Indeed, in less than twenty-four hours, the video has been viewed nearly 40,000 times. Given this, pending the return date, the NJTA also seeks to temporarily enjoin Defendants from in any way either directly or indirectly infringing or facilitating the infringement of any of the NJTA's copyrights, including requiring Defendants to remove the infringing material from their websites and taking all steps necessary to ensure that the material is not thereafter re-posted by users.

POINT I

THE NJTA IS ENTITLED TO A PRELIMINARY INJUNCTION SO AS TO PREVENT THE UNAUTHORIZED DISPLAY, PUBLICATION AND REPRODUCTION OF ITS COPYRIGHTED VIDEOS BECAUSE (1) THE NJTA IS LIKELY TO SUCCEED ON THE MERITS OF ITS COPYRIGHT INFRINGEMENT CLAIM, (2) THERE IS A THREAT OF IRREPARABLE INJURY TO THE NJTA, (3) THE BALANCE OF THE EQUITIES FAVORS THE ISSUANCE OF AN INJUNCTION, AND (4) GRANTING THE RELIEF SOUGHT HEREIN WILL NOT BE INJURIOUS TO THE PUBLIC INTEREST

Under Article I, section 8 of the U.S. Constitution, Congress has the power "to secur[e] for limited Times to Authors ... the exclusive Right to their respective Writings." This copyright clause, as stated by the Supreme Court, "is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984). As such, the author of a copyright holds a bundle of exclusive rights in the copyrighted work, among them being the right to copy and the right to incorporate the work into derivative works. Stewart v. Abend, 495 U.S. 207, 110 S. Ct. 1750, 109 L. Ed. 2d 184 (1990). Importantly, a copyright holder possesses "the right to exclude others from using his property." Fox Film Corp. v. Doyal, 286 U.S. 123, 127, 52 S. Ct. 546, 76 L. Ed. 1010 (1932). An author's rights in his copyright are set forth under the Copyright Act of 1976 ("Copyright Act"), 17 U.S.C. § 101 et seq.

Copyright protection is available for "original works of authorship fixed in any tangible medium of expression," 17 U.S.C. § 102(a), and is specifically available for raw videotapes, which have been deemed to involve sufficient creativity and intellectual input to merit copyright protection as "original works of authorship." Los Angeles News Service v. Tullo, 973 F.2d 791, 793 (9th Cir. 1992) (raw videotapes of horrific events, such as airplane crashes and train wrecks, can be original works of authorship entitled to copyright protection); Los Angeles News Service v. KCal-TV Channel 9, 108 F.3d 1119 (9th Cir. 1997)(videotape from helicopter of riots that happened to capture beating found to be copyrightable); Los Angeles News Service v. Reuters Television Internat'l Ltd., 340 F.3d 926 (9th Cir. 2003) (two video recordings of riots in Los Angeles subject to copyright protection). A "legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it." 17 U.S.C. § 501(b). A copyright owner is granted exclusive rights in the copyrighted work pursuant to 17 U.S.C. § 106.

While 17 U.S.C. § 411 holds that "[n]o action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title", "this Court has adopted the Fifth Circuit's holding that the requirements of Section 411 are satisfied when an application for registration, fee, and deposit are received at the Copyright Office." Commerce Corp. v. Selltis, L.L.C., Not Reported in F. Supp. 2d, 2006 WL 561971 *1, at 3 (D.N.J. Mar. 6, 2006)(citing to Sebastian Int'l., Inc. v. Consumer Contact (PTY) Ltd., 664 F. Supp. 909, 912 (D.N.J. 1987), vacated on other grounds, 847 F.2d 1093 (3d Cir. 1988)(citing Apple Barrel Productions v. Beard, 730 F.2d 384, 386-87 (5th Cir. 1984)). Moreover, "[o]nce registration takes place, a subsequent infringement action may address infringing acts that occurred ***either after or before that registration***, provided that the filing of the infringement action occurs within the term set in the statute of limitations." Commerce Corp., supra at 3 (citing to 2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 7.16 [B][1][a] (2005)). Significantly, registration is not a prerequisite to copyright protection under the Copyright Act. 17 U.S.C. § 408(a).

A. Injunction Standard

In the context of copyright infringement, a district court may "grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." BMG Music v. Champagne, 2006 WL 3833473 at 2 (D.N.J. Dec. 29, 2006) (citing to 17 U.S.C. § 502(a)). 17 U.S.C. § 502 provides for injunctive relief that is "reasonable to prevent or restrain infringement of a copyright", with such injunctive relief being regularly granted. See Comcast Cable Communications v. Adubato, 367 F.Supp.2d 684 (D.N.J. 2005); Directv v. Gendrachi, 2005 WL 350952 (D.N.J. Feb. 14, 2005). Further, the power to grant injunctive relief is not limited to registered copyrights or even to those copyrights that give rise to an infringement action. Olan Mills, Inc. v. Linn Photo Co., 23 F.3d 1345 (8th Cir. 1994). As set forth below, a balance of the four factors in the injunctive relief analysis as well as the regular need for injunctions in the copyright infringement context plainly support the injunction sought by the NJTA.

B. The NJTA Is Likely To Succeed On The Merits Of Its Claim Of Copyright Infringement Against Defendants

"In copyright actions, courts employ the same four-part analysis described above, but if a plaintiff is able to first demonstrate a reasonable likelihood of success on the merits of its claim, irreparable harm is presumed, and a balancing of the parties' respective interests is unnecessary." Dam Things from Denmark v. Russ Berrie & Co., 173 F.Supp.2d 277, 283 (D.N.J. 2001). To make out a *prima facie* case of copyright infringement for preliminary injunction purposes, a copyright holder must show that the defendant violated any provision of 17 U.S.C. § 106. See 17 U.S.C. § 501(a). In this regard, copyright owners may show that defendants violated their exclusive right "(1) to reproduce the copyrighted work, (2) to prepare derivative works, (3) to distribute copies, (4) to perform publicly a copyrighted motion picture, [or] (5) to display publicly the individual images of a copyrighted motion picture." Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc., 342 F.3d 191, 196-197 (3d Cir. 2003)(citing to 17 U.S.C. § 106). In order to demonstrate a likelihood of success, a plaintiff need only show ownership of the copyright and copying by the defendant. Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904 (3d Cir. 1975), cert. denied, 423 U.S. 863, 96 S.Ct. 122, 46 L.Ed.2d 92 (1975).

With respect to the first element to establish copyright infringement, the NJTA owns the copyrights to the videos that now appear on Defendants' websites. Given the angle of the videos and the location of the cameras based on the viewpoint of the videos, there is no doubt that the NJTA's traffic cameras recorded the images of the accident. Because the videos were recorded using the NJTA's cameras and support equipment, the videos are original creations of the NJTA and constitute the copyrighted property of the NJTA. In fact, on May 22, 2007, the NJTA filed applications with the United States Copyright Office to obtain federally registered copyrights for the videos of the motor vehicle accident recorded by the operations camera and the VTDM camera.

As to the second element, a public display of a motion picture constitutes "copying" pursuant to 17 U.S.C. § 106 and, accordingly, infringes on an owner's copyrights. Video Pipeline, 342 F.3d at 196-97. Here, Defendants displayed on their websites identical images to the videos copyrighted by the NJTA.

Having thus satisfied both prongs, the NJTA is likely to succeed on the merits of its copyright infringement claim.

C. The NJTA Will Be Irreparably Harmed If Defendants Are Not Enjoined

Copyright law protects the copyright owner against the harm that comes from a loss of its ability to control the distribution or display of its works. Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 555, 105 S.Ct. 2218, 2228, 85 L.Ed.2d 588 (1985). "[A] showing of a *prima facie* case of copyright infringement or reasonable likelihood of success on the merits raises a presumption of irreparable harm . . . and the copyright plaintiff is entitled to a preliminary injunction without a detailed showing of irreparable harm." Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1254 (3d Cir. 1983), cert. dismissed, 464 U.S. 1033, 104 S.Ct. 690, 79 L.Ed.2d 158 (1984) (citing Nimmer, § 14.06[A], at 14-50, 14-51 & n. 16).

In the instant matter, the NJTA has made a *prima facie* case of copyright infringement given that the NJTA clearly owns the rights to the videos and that Defendants displayed identical videos of the copyrighted works. Thus, a presumption of irreparable harm applies. See Marco v. Accent Publishing Co., Inc., 969 F.2d 1547, 1553 (3d Cir. 1992) (indicating that a showing of likelihood of success in a copyright infringement action raises a rebuttable presumption of irreparable harm).

Even if such presumption did not arise, the NJTA will suffer irreparable harm by the continued display of the images recorded by the operations camera and the VTDM camera. Display of these images is likely to confuse the public as to the source of the video recordings and suggest that the NJTA would release images of a horrific accident in total disregard of the suffering of the accident victim's family. An injunction is the only means to prevent the continued harm that will occur from the repeated display of the videos, and to allow the grieving family of the depicted driver to mourn in peace, without the heightened attention created by Defendants' conduct.

D. The Balance Of Hardships Decidedly Favors Granting Injunctive Relief

"A court should not consider a balancing of hardships as a determining factor in granting injunctive relief in a copyright matter. Allowing for a balancing of hardships would permit a knowing infringer to construct its entire business around infringement." Value Group, Inc. v. Mendham Lake Estates, L.P., 800 F. Supp. 1228, 1235 (D.N.J. 1992)(citing to Apple Computer, 714 F.2d at 1255). In other words, the fact that an injunction will require an infringer to forego profits generated by the use of an infringing product should be given little, if any, consideration. See id.

Here, the burden on Defendants will be simply to remove the infringing videos. When this slight burden is compared with the irreparable harm to the NJTA and the victim's family that will result from the continued display of these videos, there is no doubt that the balance of equities weighs in favor of granting an injunction.

E. The Public Will Continue To Be Injured Absent An Injunction

The public has no interest in permitting a company to copy another company's work. Value Group, 800 F. Supp. at 1234. The public interest that takes center stage in the injunctive relief analysis in copyright infringement actions is the interest in protecting copyrights. Indeed, the Third Circuit has explained:

> Since Congress has elected to grant certain exclusive rights to the owner of a copyright in a protected work, it is virtually axiomatic that the public interest can only be served by upholding copyright protections[.]

Apple Computer, 714 F.2d at 1253-54. Accordingly, the public interest in protecting the NJTA's copyrighted videos, which is the fourth factor in the injunctive relief analysis, will be advanced by the granting of injunctive relief.

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CONCLUSION

The NJTA has a high probability of prevailing on the merits of its copyright infringement claims, and there is a likely possibility of future irreparable harm. Therefore, the NJTA respectfully requests that a preliminary injunction be granted preventing the further display of its copyrighted works, and that Defendants be enjoined from in any way directly or indirectly infringing or facilitating the infringement of any of the NJTA's copyrights.

DATED: May 22, 2007

Respectfully submitted,

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